

James Dewar

Refuse

AUGUST 3. 1766.

Unto the Right Honourable, the Lords of Council and Session,

T H E
P E T I T I O N
O F
JAMES DEWAR of Vogrie, Esq;

HUMBLY SHEWETH,

THAT in the process depending before the Lord Gardenston, Ordinary, at the instance of Mr. William Fraser junior, writer to the signet, against the petitioner, his Lordship, of this date, pronounced the following interlocutor: "Having considered the condescendence for the pursuer, answers, replies, and duplies, before answer, allows the pursuer to prove his libel, and facts set furth in his condescendence and replies; and the defender to prove the facts set furth in his answers and duplies; and to both parties, a conjunct probation thereupon, and of all facts and circumstances relative thereto, that either party may judge material in the cause, all prout de jure, and grants commission, &c."

7. Aug. 1766.

This interlocutor the petitioner must humbly submit directly to your Lordships, as he is informed the Lord Ordinary has been obliged to go out of town, and no opportunity would therefore be had of representing to his Lordship.

And the single reason in which the petitioner shall, at present, insist for an alteration, is, that the cause cannot proceed, because all parties having interest are not called.

The fact is, that the water of Ford, on which the petitioner has a mill, divides for some little way, certain lands respectively belonging to him and the pursuer, and the pursuer has brought an action, complaining, that the petitioner and John Weir his tackfman, had lately made *certa nova opera* on the river, which they had not right to make, and were in danger of doing hurt to his conterminous property; particularly, 1mo, That a mole or barricade has been erected across the channel, by which the water, instead of flowing, as the pursuer pretended it used to do, through the petitioner's own grounds, was all forced into what the pursuer called a mill lead or aqueduct for causing said mill to go, (but which has truly, for time immemorial, been the river itself and channel thereof,) that separates the property of the parties as aforesaid. 2do, That the river or mill lead, which divided their property, had been both widened and deepened, and did thereby endanger the bank and lands belonging to the pursuer on the south side of the river. And 3tio, That certain dams or sluices had also been made, by which the current of the water was changed, and instead of flowing beneath the north arch of a bridge at Ford, was made all to flow under the south arch, to the danger of the bridge, which the pursuer is bound to uphold, and to his prejudice in other respects; and concluding for demolition of the alledged *nova opera*, and for damages.

It was answered *inter alia* for the petitioner, that his grounds lying on the north side of the river were mostly under lease; particularly, that there was a bleachfield set in tack for more than 100 years; and that several of these operations were not made by the petitioner, but the tacksmen of the bleachfield, or their order for the use of the bleachfield: Therefore it was insisted, that the petitioner could not be answerable for these operations not done by himself, or be obliged

obliged to be at any or all the expence in defending them; and, at any rate, that they could not be found unlawful, or ordered to be demolished, till the tacksmen, particularly Mr. *Thomas Smith* the present tenant in possession, who is personally liable to the petitioner for the whole rent, should be called and heard for their interest.

And the pursuer was himself so sensible that that was necessary to be done, that he has actually summoned the said *Weir*, who was originally a tacksmen of the bleachfield. But that was merely a farce, and truly making a mock of justice, because *Weir*, who was only one of a company to whom it was set, has long ago been bankrupt, and retired out of the country to avoid the diligence of his creditors, which was well known to the pursuer at the time of executing the summons, as cannot be denied, and appears from the execution itself, bearing to be made at the market cross of *Edinburgh*, pier and shore of *Leith*; and accordingly, as was to be expected, no appearance has been made for him. Therefore, the petitioner contends that the tacksmen, particularly Mr. *Thomas Smith*, are the proper parties to defend their own operations, and that they are materially interested in the cause, which cannot therefore either be entirely laid on the shoulders of the petitioner, or proceed till they have an opportunity of being heard for their interest.

May it therefore please your Lordships to alter the Lord Ordinary's interlocutor above recited, and to sist the present process till the tacksmen, particularly the said Mr. Thomas Smith, be made parties to it.

According to Justice, &c.

GEO. WALLACE.